No. 361

In the Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners, THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland, and intervenors, SYLVESTER E. BROWN, doing business as S. E. Brown & Company, BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation), CARSTEN'S PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDougall & Company, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Appellants

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STATEMENT OF THE CASE.

This case was brought in the Circuit Court by the United States Fidelity & Guaranty Company, of Baltimore, against the appellants, for the purpose of enjoining the payment to appellants of the final estimate due upon a contract with the United States Government and of establishing the alleged right of the complainant to receive such payment.

On May 12, 1903, the defendants, Henningsen and Clive, entered into a contract with the United States for

the construction of certain buildings at Fort Lawton, Washington, for the aggregate price of $46,500.00 (printed record, pp. 28, 34, 35). The contract contained the following provision: "In all payments, 20 per centum of each to be retained until the final completion and acceptance by the Government of the work under contract." (p. 35.) The contract did *not* contain any clause providing for the retention of any portion of the payments to secure payment of persons supplying labor or material. Henningsen and Clive, as principals, and the complainant as surety, made and delivered to the United States a bond in the penal sum of $11,625.00, conditioned: First, for the performance of the contract for the construction of the buildings at Fort Lawton; and, second, for the full payment of all persons supplying labor or materials in the progress of the work (p. 36). Thereafter, the defendant Clive withdrew from active performance of this contract (pp. 30, 59).

Beginning with October 10, 1903, and ending with May 14, 1904, Henningsen borrowed from The National Bank of Commerce of Seattle amounts aggregating $4,870.00, giving his notes therefor, upon which there was due at the time of the commencement of this action $5,044.79.

At this time, to secure the payment of these notes, Henningsen, on behalf of his firm, agreed to turn over to the bank the payments on the contract with the Govern-

ment, and thereafter, on March 16, 1904, assigned all payments thereon then due or thereafter to become due and gave an order directed to Captain F. A. Grant, United States Quartermaster at Seattle, for the delivery of all checks for any balance on the contract to Spencer, the cashier of the bank. In obtaining the loan from the bank, Henningsen stated that he was obtaining the same for the purpose of meeting his pay roll and to pay for material on the Fort Lawton contract, and also to pay a small indebtedness arising from a former contract which he had with the Government, which indebtedness threatened to interfere with his Fort Lawton contract (pp. 47-53).

To avoid any misunderstanding, we wish to concede at this time that the making of these loans did not entitle the bank to subrogation to the rights, if any, of either the United States or the laborers or material men, and to further concede that if the surety company is entitled to subrogation to any right of the United States Government arising through the Henningsen contract, the bank can make no claim by reason of the assignment. As will be hereafter stated, our claim is totally different. But we deem it proper to state the facts with reference to this assignment and the loan for the purpose of showing that Henningsen in joining in this appeal does so, not for the purpose of defeating any just claim of the surety, but for the purpose of carrying out his agreement with the bank, which he can and should do in the absence of a prior claim on the fund in favor of the surety company.

About the beginning of June, 1904, the work on the Fort Lawton contract having been substantially completed, the Government, through the quartermaster at Seattle, was about to pay to the contractors the balance due on the contract; and it was arranged that the checks therefor should be turned over to Spencer, in accordance with the assignment and order hereinbefore set forth, to be applied in so far as necessary in payment of the bank's claim (pp. 5, 6, 30). The complainant thereupon filed with the Secretary of War its petition asking him to disregard, and to instruct his subordinate officers to disregard the assignment, and to cause the sums due on the contract to be applied in payment of the contractors' indebtedness for labor and materials. The War Department decided that this petition should be disregarded, and arranged to pay the whole amount remaining due on the contract to the contractors on the 9th day of May, 1904 (p. 6). To prevent this payment, the complainant commenced this action on June 8, 1904, alleging substantially the facts hereinbefore set forth, and asking that the appellants be enjoined from receiving the money, and that the court compel the payment thereof to the laborers and material men on the contract (pp. 3-7).

On June 17, 1904, the complainant and the defendants entered into a stipulation providing that all the money then due from the United States Government, amounting to $13,066.00, should be paid over to the defendant Spencer, and that of this amount, all, except the

sum of $5,041.79, then due the bank, should be disbursed by the said Spencer in part payment of certain claims for labor and material furnished in the performance of the Fort Lawton contract. This agreement provided that the $5,041.79 so retained by the bank should be subject to this litigation, and that the rights of none of the parties to this action should be prejudiced by the agreement (p. 37). The amount so to be paid out to the creditors was disbursed in accordance with the stipulation (p. 51).

While the suit was pending on demurrer to the answer, Sylvester E. Brown, E. C. MacDougall & Co., Carstens Packing Company, Bryant Lumber & Shingle Mill Company, W. O. Nelson, The C. B. Smith Company and E. E. Caine, by leave of the court, filed a petition and bill in intervention setting out the Fort Lawton contract, the bond for the performance thereof, the payment of the money to Spencer, as hereinbefore set forth, and the fact that a portion thereof was reserved until the determination of this action, to be disposed of as the court might determine. The intervenors further set out that they were respectively creditors of Henningsen and Clive on account of labor and material done and furnished in the performance of the contract. The intervenors asked that the amount reserved by Spencer be paid to them on account of their claims for labor and material (pp. 35-42). Both the complainant, the Surety Company, and the defendants, these appellants, moved to strike this bill of intervention on the ground, among other things, that it

appeared upon the face of the bill that no legal or equitable ground of intervention existed in favor of the intervenors (pp. 24, 25). This motion was granted by the court, the court holding that none of the intervenors had any legal or equitable ground of intervention, and that none of them had any lien upon or right to the fund in question (p. 27).

Thereafter, the complainant filed an amended and supplemental bill of complaint. This amended and supplemental bill, in addition to various facts set out by the original bill, set up the making of the stipulation under which the final payment from the Government was paid to Spencer, stated that of the amount so paid $8,024.21 was paid to the creditors of Henningsen and Clive in accordance with the stipulation, and that the balance, $5,041.79, was held by the bank subject to the terms of the stipulation. It further alleged that, after the payment to the creditors as aforesaid, there remained due to the creditors of the contractors, who were entitled to share in the penalty of the bond, more than thirteen thousand dollars. It further set out that it had commenced a suit in equity against the various creditors of Henningsen and Clive on the contract in question, and had therein tendered itself as ready to pay into the registry of the court the full penalty of the bond for distribution among the defendants, as their rights should be established (pp. 28-33). An answer was interposed to this bill, setting up the claim of the bank against Henningsen, and the as-

signments and orders on the fund. The making of the stipulation and the payment of a portion of the money and the retention of the remainder thereunder was admitted, as was also the making of the contract and the bond. The defendants, however, denied on information and belief the amount remaining due to the creditors, and also denied any information as to the action in equity in question, except that such an action had been brought against some or all of the persons claiming to be creditors on the contract. A general replication was filed to this answer. No proof was offered in support of the amended bill.

Thereafter the cause was submitted, and the court rendered its memorandum decision on the merits.

So far as the matters in controversy here are concerned, the following quotations from this opinion will suffice to show the nature of the decision:

> "In the main controversy I hold that the contractor made default in the condition of the bond by failing to pay for materials and labor, and that by default the bonding company became absolutely liable for the full amount of the penalty of the bond. To such liability an equitable right attached to have the balance due from the Government on account of the contract applied to the debts of the contractor secured by the bond. The defaulting contractor could not defeat this equit-

able right by an assignment of the payments to be made by the Government. The bank, as assignee, occupied no better position than the assignor to resist the application of the payments in reduction of debts secured by the bond. Therefore it will be decreed that the bank pay into the registry of the court the balance of the money which it received under the stipulation and the taxable costs of the litigation made by its controversy." * * * "Upon paying into court the full amount of the penalty of the bond, the bonding company will be entitled to be dismissed, absolved from all liabilities upon the bond in suit." (p. 56.)

Thereafter the court made findings of fact and conclusions of law and a decree was entered thereon (pp. 57-62). The decree departed from the memorandum decision in this: The decision held that the complainant had an equitable right to have the balance due from the Government applied to the debts of the contractors secured by the bond. The decree ordered that the sum held by the bank be paid into court for the sole use and benefit of the complainant.

In its findings, conclusions and decree the Circuit Court decided that the assignment to Spencer was void, and that the complainant, by reason of the obligation and liability assumed by its execution of the bond, was entitled to receive the money held by the bank.

It nowhere appears that the complainant, at the time of the entry of this decree by the Circuit Court, had made any payment whatsoever to the creditors of Henningsen and Clive. It further appears that the complainant has no intention of completely satisfying their claims.

From the decree of the Circuit Court, these appellants appealed to the Circuit Court of Appeals for the Ninth Circuit (pp. 62-68). Pending this appeal, there was filed with the clerk of the Circuit Court of Appeals a certificate or statement, dated October 27, 1905, from the clerk of the Circuit Court, entitled in the cause of the United States Fidelity and Guaranty Company vs. E. E. Caine, et al., to the effect that since the judgment in that case, the United States Fidelity and Guaranty Company paid into the registry of the Circuit Court the full amount of said judgment, to-wit: $11,594.50; that the same had been drawn out by the creditors of Henningsen and Clive in whose favor the judgment was stated to be rendered, and that the judgment had been fully satisfied by the complainant, the United States Fidelity and Guaranty Company (p. 69).

Thereafter the Circuit Court of Appeals rendered its opinion and decree, affirming the decree of the Circuit Court (pp. 70-74). The Circuit Court of Appeals referred to the certificate of the clerk of the Circuit Court as showing that the complainant had paid the full penalty of its bond (p. 72). The substantial ground for its

decision will be found in the last paragraph of the opinion, and as there expressed is substantially this: The surety is entitled to be subrogated to the rights of the laborers and material men where it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal.

The Court, however, based this conclusion in part upon Sections 3477 and 3737, U. S. Revised Statutes, declaring certain assignments of claims against the Government void, and upon the provisions of 28 U. S. Statutes at Large, 278, requiring the bond in question.

SPECIFICATION OF ERRORS.

The assignments of error are set forth on pages 77 and 78 of the printed record. Omitting the general and formal assignments, the specifications may be more briefly stated as follows:

1. The court erred in holding that laborers or material men upon Government work have any right to or lien upon the amount to be paid by the Government to the contractors for such work; and there being no such right, the court erred in holding that the complainant, the surety upon the contractor's bond for the performance of such work and the payment of such laborers and material men, had a right of subrogration to such rights or liens of laborers or material men.

2. The court erred in holding that said surety had such right of subrogation without first paying the claims of such laborers and material men.

3. As the record shows that the respondent in the Circuit Court contended that the laborers and material men had no right to the fund in controversy, and as this contention was upheld by the Circuit Court, the Circuit Court of Appeals erred in not holding that the respondent was thereafter estopped from claiming that such laborers and material men had such right to said fund and that the respondent was entitled to be subrogated thereto.

4. It did not appear at the time the judgment was entered by the Circuit Court that the surety had in fact paid to the laborers and material men the penalty of its bond, but it is stated in the opinion of said Circuit Court of Appeals that it appears from a certificate of the clerk of the Circuit Court that the complainant had since done so. The Circuit Court of Appeals erred in considering said certificate and in basing its opinion, decision and judgment affirming the judgment of the Circuit Court upon facts transpiring since the judgment of said Circuit Court was entered.

5. In case said surety was entitled to any subrogation whatsoever, the court erred in extending such subrogation to any amount in excess of the twenty per cent.

stipulated by the contract to be reserved until full performance of the work upon the contract.

6. In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent was not entitled to retain the same, both by reason of the consent of the other defendants by their answer, and by virtue of the assignment to Spencer for the use of the bank, which was good as between the parties, and only void as against the Government of the United States and those subrogated to its rights.

ARGUMENT.

I.

Our contention is that the contract, so far as the United States is concerned, had been fully performed, so that there was no right of the Government to which the surety company could be subrogated; that the creditors furnishing labor and material had no lien upon the fund, and that therefore there was no right in their favor to which the surety company could be subrogated; that therefore the War Department was entitled to pay it to the contractors or to their assignee, the bank, and that either the contractors or the bank was entitled to receive it. We therefore respectfully submit that the Circuit Court of Appeals was in error in stating that "the real question in the case is one of priority of equities as be-

tween the bank and the surety company." The real question is whether the surety company had any equity whatsoever.

It must recover, if at all, on the strength of its own right. This right must be something more than the general right of a creditor to be paid. It must be something in the nature of a lien, legal or equitable, upon the particular fund.

We are somewhat embarrassed by the multiplicity of inconsistent grounds assigned for the right of the surety company. The Circuit Court held that the laborers and material men had no lien upon or right to the fund. The Circuit Court of Appeals held, by implication, that they had such right, and expressly held that the surety company was entitled to be subrogated thereto. The Circuit Court in its memorandum decision held that the surety company had an equitable right to have the balance due from the Government applied to the debts of the contractor. Its decree orders the bank to pay the whole amount in its hands to the surety company for its own use and benefit, though the debts of the contractor secured by the bond had not been paid, though the amount of the penal obligation of the bond was not sufficient to pay them, and though (as was held by the Circuit Court) the creditors themselves had no right to the fund.

We may, however, assume that the complainant claims the fund through the right of subrogation and bases its claim upon—

Prairie State Bank vs. United States, 164 U. S. 227;

First National Bank of Seattle vs. City Trust, Safe Deposit and Surety Company, 114 Fed. 529;

Greenville Savings Bank vs. Lawrence, 76 Fed. 545;

Lawrence vs. United States, 71 Fed. 228;

Reid vs. Pauly, 121 Fed. 652;

Richard Brick Company vs. Rothwell, 18 App. Cases D. C. 516.

These cases, except *Reid vs. Pauly*, were all based, and the contention of the surety company in this case is founded, upon "an Act for the protection of persons furnishing materials and labor for the construction of public works" (28 U. S. Statutes at Large, 278), approved August 13, 1894, which contains the following provision:

> "Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly

> make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract;"

and upon bonds given in pursuance thereof, and also upon certain provisions of the contracts which the bonds were given to secure.

All of the cases mentioned have certain points in common with this case, but (with the exception of *Richard Brick Company vs. Rothwell*) in other features differ from the present case, and the facts in which they so differ are precisely the facts on which in each case the decision of the court in favor of the surety company was based.

In the Prairie State Bank case, the contractor had defaulted and the surety assumed performance of the contract, completed the work, and in so doing disbursed an amount in excess of the reserved final payment, being in that case ten per cent. of the contract price. The court held that the surety, having performed for the United States Government the work which his principal, by his contract, was required to perform, was entitled to be subrogated to the rights of the United States in the ten per cent. reserved for the Government's protection.

In the present case, the work had been completed by the original contractor, and the object for which the twenty per cent. was to be retained had been fulfilled, and to quote from the contract providing for this reten-

tion, there had been a "final completion and acceptance by the Government of the work under contract." The Government had, therefore, no claim against Henningsen for which it was entitled to withhold this twenty per cent., and, as the original bill stated, the Government was about to pay over the money.

In the First National Bank case above cited, the contractors abandoned the contract, and the sureties completed the same. In addition, the contract contained a clause providing for the retention of thirty per cent. of the contract price to secure the payment of laborers and material men. Neither of these facts exist in the present case. Without again discussing the principles involved in the Prairie State Bank case, we quote from the opinion in the First National Bank case on page 532, as follows:

> "By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatsoever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder, forfeited."

It thus appears that the decision is based upon a default of which the city which held the fund could take advantage.

Furthermore, in that case there is a dissenting opinion by a member of this court, holding that the rule in the Prairie State Bank case had been misapplied and that the surety was not entitled to be subrogated to any part of the sum due the contractors, except the amount, the retention of which was stipulated for in the contract. This matter will be considered later.

In

Greenville Savings Bank vs. Lawrence, 76 Fed. 545;

Lawrence vs. United States, 71 Fed. 228, and

Reid vs. Pauly, 121 Fed. 652,

the contract expressly provided for a retention of a portion of the purchase price until laborers and material men were paid.

It thus appears that the decision in each of these cases was founded upon the fact, either that the contractors had failed to perform their contract and the sureties had completed the performance thereof for the Government, or that the contract provided for the retention of a portion of the contract price until laborers and material men were paid. In the present case, neither of these facts is found. The original contractors finished the work for the Government; and the contract contained no stipulation for retaining any part of the amount due for the payment of laborers and material men.

Therefore, in the present case, there is no default of which the Government can take advantage. So far as it is concerned, the contract has been fully performed.

This view is supported by—

United States vs. Rundle, 100 Fed. 400, and

United States vs. National Surety Co., 92 Fed. 549.

As stated in these cases, a bond conditioned as the bond in this case is of a dual nature, and in effect may be regarded as two bonds; first, a bond for the benefit of the United States and securing the completion of the work; and second, a bond for the benefit of laborers and material men, and securing the payment of their claims. So far as the latter phase of the bond is concerned, the United States is not a real party in interest, being merely a nominal obligee. When the work is completed, the United States has no further interest in the bond.

In *United States vs. Rundle, supra*, it appears that the work on the contract had been completed, though all claims for labor and material had not been paid. The court, alluding to these facts, says:

> "The United States, having received such full performance, received all that it was entitled to, and therefore, had no cause of action upon the bond."

There was, therefore, no right or equity left in the United States to which the complainant could be subrogated.

Liles vs. Rogers, 113 N. C. 197; S. C. 37 Am. St. Rep. 627.

The laborers and material men never had any right to the fund.

Aside from some statutory or contract provision, laborers or material men have no claim, legal or equitable, either against the property improved, or the contract price.

Lawrence vs. United States, 71 Fed. 228;

Canal Co. vs. Gordon, 6 Wallace 561, 571;

Withrow Lumber Co. vs. Glasgow Investment Co., 101 Fed. 863-868;

Mechanics and Traders National Bank vs. Winant, 1 N. Y. S. 659-660;

Randolph vs. City of New York, 53 Howard's Practice 68;

Phillips on Mechanic's Liens, Sec. 1;
20 Am. & Eng. Enc. Law. (2nd Ed.), 269, 293.

Of course, in no case is there such a claim in the case of public property.

20 Am. & Eng. Enc. Law (2nd Ed.), 295.

There is but one case cited by appellee which supports its contention in this case, and that is

Richards Brick Co. vs. Rothwell, 18 App. Cases, D. C. 516.

This case does hold that the persons furnishing labor and material have an equitable right to have the balance of the purchase price applied in payment of their claims, and that if a surety discharges these claims, it is entitled to be subrogated to this equitable right. So far as we have been able to ascertain, this rule has never been laid down in any other jurisdiction. In so far as the equitable right of the claimants is concerned, it is opposed in principle to the cases decided by the Supreme Court of the United States and other courts hereinbefore cited. So far as we are able to recall, not only does this rule not prevail in other jurisdictions, but it has rarely, if ever, been claimed. While courts have frequently stated that a right of this character is purely statutory, they have done so, not because anyone claimed the contrary, but by way of explaining their construction and limiting the effect of mechanics' lien statutes.

The case of

Lawrence vs. the United States, 71 Fed. 228,

cited by the appellee, negatives any lien or right of subrogation in favor of the surety company in this case, to the same extent as it negatives any right of subrogation on the part of the bank. It is stated on page 230:

> "A surety pays the debt of his principal. He is subrogated to all the rights of the creditor, and is entitled to the protection of all the collaterals held by him,—rights which he can enforce.

But these laborers and material men have no rights, as against the government,—rights which can be enforced. There is no privity between them and the government. They are recipients of its bounty, debtors to its good will, objects of its provident care, in whose favor, *suo motu*, it exercises its right and privilege to withhold the money until their claims are satisfied. Nor have they any specific interest in the money so withheld. It is not necessarily applicable to their claims. Lawrence could satisfy them in any way, and, upon evidence that their claims were arranged, he could get the money which had been withheld. So 'subrogation' is not the term to be applied to this transaction. If subrogation existed at all, it must be as to the rights of the laborers and material men to whom Lawrence paid the money the bank lent to him. As has been seen, they had no rights."

On page 233, the court says:

"There is still another view of this case. The contract gave to the United States the right and privilege of withholding a part of the contract price, for a specified reason,—that laborers and material men were not promptly paid. This right and privilege the United States could exercise or not, at its option. Until it was exercised, Lawrence could demand the money earned on his contract."

It therefore appears that in the Lawrence case, even though the contract provided for the retention of a portion of the fund for the benefit of the laborers and material men, they had no claim upon the fund until the government had exercised its option to withhold the fund for their benefit.

In the present case the contract provided for the retention of the twenty per cent. until the final completion and acceptance by the Government of the work under contract, not that this per cent. or any amount whatsoever might be retained until persons furnishing labor or materials were paid. This stipulation is for the benefit of the Government alone. It cannot by construction be extended beyond its plain terms for the benefit of the laborers and material men. They have no right to the fund, and the Government has no right to retain the fund for their benefit when the conditions of the contract, so far as the Government is concerned, have been performed. Further, the Government has not claimed or attempted to exercise any option to withhold the money for the laborers and material men. It was about to pay the money to the contractors, and for that reason respondent brought this suit.

In brief, therefore, we contend that the complainant cannot be subrogated to any rights of the Government, because the contract had been fully performed and the Government had lost all interest in the retention of the

fund; and that the complainant cannot be subrogated to the rights of the laborers or material men, because the fund was not retained for their benefit and they have no interest therein to which the right of subrogation can attach.

It has been contended by the appellee that a surety who undertakes performance of his principal's obligations, is entitled to all the moneys, securities and liens of his *principals*. We know of no such rule. A surety does not acquire a general lien over all the property of the principal obligor, but in general stands, with reference to him, as does any other creditor. It is frequently stated, however, that a surety, upon performing his principal's obligation, does become entitled to all the liens, and securities of the *creditor*. This rule, is, however, always subject to the implied qualification that the liens and securities must be such as the creditor would have been entitled to enforce for the particular obligation which the surety discharges. In other words, the surety may acquire the right of the original creditor, but he cannot acquire any greater rights. This limitation of the rights of the surety by those of the creditor is so obvious and elementary that we will simply cite the court to text book authority. See:

27 Am. & Eng. Enc. Law. (2d Ed.), page 206.

Applying this principle, if the surety in this case had paid the claims of laborers and material men, this would

not have entitled it to any lien upon the fund held by the United States and which both under the provisions of the contract and the universal legal rule, irrespective of the contract, the Government would have been entitled to withhold until the work was performed. The surety could only prevail by establishing some rule by virtue of which the creditors whose claims it paid had a lien on the fund in question.

II.

Assuming, however, for the sake of the argument, that the creditors had some right to this fund, and that the complainant might acquire the right by subrogation, the complainant has not complied with the conditions necessary to entitle it to this right. Aside from the certificate of the clerk of the Circuit Court hereafter discussed, there is nothing whatever in the record to show that the complainant has ever paid any part of the claims of the laborers and material men. The right of subrogation does not arise until the surety has made such payment.

Aetna Life Insurance Co. vs. Middleport, 124 U. S. 534;

Prairie State Bank vs. United States, 164 U. S. 231;

Conwell vs. McCowan, 53 Ill. 363;

Columbia Finance & Trust Co. vs. Kentucky Union Railway Co. (C. C. A. Sixth Circuit) 60 Fed. 794;

Vert vs. Voss, 74 Ind. 565;
James vs. Day, 37 Iowa 164.

Not only is there no showing that the complainant ever has paid the laborers and material men, but it appears that the amount of their claims exceeds the amount of the penalty of the bond. If the complainant claims to be entitled to subrogation to the rights of the creditors, the contention amounts to this: Though this bond was given to the United States for the security of laborers and material men, the complainant, by right of subrogation to their rights, is entitled to take the fund arising from the contract, and leave the persons primarily secured unpaid.

In considering this question, it is important to bear in mind that the relief granted the appellee by the lower court was,

> "That the defendant * * * forthwith pay into the registry of this court *for the sole use and benefit of the complainant herein*, the sum of $5,041.79." (Record, page 62.)

The order was not made for the benefit of laborers or material men, and the relief granted was not in any manner contingent or collateral. In most of the cases cited, by respondents below, the original creditor was consenting to the partial subrogation. He was willing to share his lien with the surety. In none of the cases cited by respondents below is it held that the surety is entitled to

receive the proceeds of the creditor's securities when he has made no payment whatsoever on the creditor's claims.

The appellee argues that the appellants are not concerned in this question. Henningsen is a party to this appeal. He is certainly interested in and entitled to be heard upon the question as to whether his surety shall receive this money if it has made no payment whatsoever to the creditors. The result of such a procedure would be that the surety would receive the money as a pure bonus, Henningsen would fail to receive his payment from the government, and he would still remain bound for the debts, on account of its collateral obligation for which the surety claims the right to receive the fund.

III.

As the respondent contended in the lower court in its motion to strike the bill of intervention that the laborers and material men had no equities (pp. 25 and 28), and thereby secured a decision from that court that the laborers and material men

> "have not and none of them has any lien upon or against or right to the fund heretofore paid to the National Bank of Commerce of Seattle and begin a portion of the sum paid on the contract of the defendants Henningsen and Clive with the United States Government" (p. 27).

the respondent is now estopped to contend the contrary. It must try its case in this court upon the same theory and legal principles upon which it tried it in the lower court. It should not be permitted, in the hope of securing in some manner a larger share of the fund, to obtain from the lower court a decision that the creditors had no right or lien to the fund in question, and then, to obtain an affirmance of the judgment, come into this court and claim that the creditors have such a lien and that the appellee is entitled to be subrogated thereto. Upon this point we cite:

Davis vs. Wakelee, 156 U. S. 680, 689;

Philadelphia, etc., Railroad vs. Howard, 13th Howard (U. S.) 307;

Railroad Company vs. McCarthy, 96 U. S. 258, 267;

Hodges vs. Winston, 95 Ala. 514;

Abbot vs. Wilbur, 22 La. Ann. 368;

Savings & Trust Company vs. Bear Valley Irr. Co., 112 Fed. 693, 704.

In the last case cited, the Court says: "A party is not permitted to assume inconsistent positions in the same litigation."

It has been intimated by the appellee that the court made this ruling upon some point of procedure. The order striking the bill of intervention shows, however, that the court considered the merits of their claim and decided

"* * * that said intervenors have not, and none of them has, any lien upon or against, or right to the fund. * * * (Printed Record, page 27).

IV.

As has already been stated, at the time of the entry of the decree of the Circuit Court it was not shown that the surety company had made any payments whatever on the claim of the laborers and material men; and so far as we know, no payment whatsoever had in fact then been made thereon. Long after the appeal to the Circuit Court of Appeals had been perfected, the clerk of the Circuit Court made out a statement, which was filed with the clerk of the Circuit Court of Appeals, to the effect that the surety company had paid $11,594.50 into the registry of the Circuit Court; that the same had been drawn out by the creditors of Henningsen and Clive, and that the judgment in the action of the *United States Fidelity and Guaranty Company vs. Caine* had been fully satisfied by the complainant (p. 69). It is to be noted:

(a) That this certificate does not state that any such payment had been made at the time of the decree by the Circuit Court, but the contrary is to be inferred.

(b) That this certificate is made out in an action other than that now before the court.

(c) That it does not purport to be a copy of any document either in this case or that case.

(d) That the amount paid into court was less than twelve thousand dollars, while the total amount of these creditors' claims was more than twenty thousand dollars (p. 29).

We contend that upon elementary principles of law this certificate should not have been considered by the Circuit Court of Appeals; that the decree of the Circuit Court should have been sustained or reversed upon the evidence before that Court and the facts as they then existed; that the so-called certificate, so far as these appellants are concerned, was hearsay; that the satisfaction by complainant of any judgment in that action could not be evidence that the creditors of Henningsen and Clive had been paid, and that even if such certificate was competent to show the payment into court in question, the amount thereof was not sufficient to satisfy the claims of the creditors and would not entitle the complainant to receive the balance due upon the contract. On incompetency of this certificate see

Hudgins vs. Kemp, 18 How. 530, 534.

V.

The contract price agreed to be paid to Henningsen and Clive was $46,500, and the amount stipulated to be retained thereon until the final completion and acceptance of the work contracted for was twenty per cent., or $9,300 (p. 35). Under stipulation of the parties to this action there was paid to the complainant, after the commencement of this suit and before the filing of the amended bill, $8,024.21 of this amount, being the whole twenty per cent. except the sum of $1,275.79; but the Circuit Court and the Circuit Court of Appeals gave judgment in favor of the complainant and against the bank, not simply for this amount, but for the amount of $5,041.79 which was deposited with the bank under the terms of the same stipulation. The fact that the representatives of the Government, at the completion of their work, had on hand to the credit of the contractors, more than twenty per cent. of the contract price, was merely an accident. It was not retained in pursuance of any contract right; and neither the surety on the bond nor the laborers or material men could have required it to be retained, or could have had any right to the surplus above the twenty per cent., even if it was retained. Therefore, if the complainant was entitled to anything, it could not have been, in addition to what it did receive, more than the sum of $1,275.79. This position is fully sustained by the Prairie State Bank

case as construed by a member of this court in the case of

First National Bank vs. City Trust, Safe Deposit & Surety Co., 114 Fed. 534.

VI.

If the complainant has no lien upon or peculiar right to the fund in question, the defendants, Henningsen and Clive, had a right to see that it was applied in payment of the bank's claim in pursuance of Henningsen's agreement, and this would be true, even if no effect were given to the assignment. However, Sec. 3477, U. S. Rev. St., declaring such assignments void, has been held by the courts to have been passed for the protection of the United States only, and not to prevent the assignment being good as between the parties themselves.

York vs. Conde, 147 N. Y. 486;

Conde vs. York, 168 U. S. 642;

In re Hone, 153 N. Y. 552;

Dulaney vs. Scudder, 94 Fed. 6;

Lopez vs. United States (U. S. Court of Claims), 2 L. R. A. 571.

Considering such prohibitions, this court has held:

"Their purpose was not to dictate to the contractor what he should do with the money re-

ceived on his contract after the contract had been performed."

Hobbs vs. McLean, 117 U. S. 567, 576.

Furthermore, even if the complainant is entitled to subrogation to some lien or equity of Henningsen's creditors, it is not shown when the claims of these creditors arose. Under the reasoning of the Prairie State Bank case, the equity of these creditors would attach not when the bond was given, but when, thereafter, they voluntarily furnished the materials or labor. If, therefore, the assignment to Spencer was good as between the parties, the complainant has made no showing that the equities, to which it claims subrogation, arose before the date of the transfer to Spencer.

Respectfully submitted,

W. W. WILSHIRE,
Solicitor for Appellants.
GEORGE E. DE STEIGUER,
Of Counsel.

In the Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER, *Appellants.*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation), *Respondents.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Appellants—On Motion to Dismiss

W. W. WILSHIRE,
Solicitor for Appellants

GEORGE E. DE STEIGUER,
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IN THE

Supreme Court of the United States

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of Appellants—On Motion to Dismiss

STATEMENT.

As a general statement of the nature of action, little need be added to the statement contained in the brief of the respondents, designated as the brief of the defendants in error. Relating to the question of jurisdiction, however:

The bill of complaint alleged that the defendants, Henningsen and Clive, entered into a contract with the United States for the construction of certain buildings.

That these contractors were required to present with their contract a bond, being the bond under which the complainant, now the respondent, claimed in this case.

That the respondent, in consideration among other things of the provisions of the United States Statutes making null and void any assignment or assignments of any sums which might become due on the contract, joined in the bond, and, together with the contractors, made, executed and delivered the bond.

A copy of the bond is referred to in the bill of complaint and attached thereto, and shows upon its face that it was executed in pursuance of and conditioned according to the terms of the Act of Congress of August 13, 1894, entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works."

28 *Statutes at Large*, 278.

Paragraph V of the bill alleges that a certain sum of money, being a part of the contract price, "is now in the hands of the United States".

Paragraph VI of the bill of complaint states that the defendants, Henningsen and Clive, "contrary to the Statute of the United States in that behalf", had executed and delivered an assignment to the defendant bank

or to the defendant Spencer of moneys to become due under the contract.

Paragraph VIII alleges that the complainant, here respondent, had applied to the Secretary of War asking that the assignment be disregarded, but that nevertheless the quartermaster at Seattle was about to pay out the full amount of the contract to the contractors, and that the contractors would pay the same to the bank or Spencer.

The prayer of the complaint asked that the assignment in question be declared to be null and void as against the complainant, that the defendants be enjoined from receiving any money under the contract and be ordered to permit the same to remain in the possession of the United States and its official representatives pending the final determination of the cause. So far as jurisdictional questions are concerned, it is unnecessary to quote or cite the remainder of the bill, as it is along the same lines as the part already referred to. Printed Record, pages 3 to 8.

The memorandum decision, findings of facts and conclusions of law and decree of the Circuit Court recites that the decision is based upon the contract and bond in question, construes the bond, and declares the assignment of the fund void and of no force or effect whatsoever as against the complainant. (pp. 56-62). The opinion of the Circuit Court of Appeals takes up in detail and dis-

cusses the construction of the bond in connection with the Statute under which it was given and the Statutes of the United States (Rev. St. Secs. 3477, 3737), under which it is held that the assignment of the fund is void. (pp. 70-74).

ARGUMENT.

The jurisdiction of this court, of course, depends upon the grounds of jurisdiction of the Circuit Court. The respondent Surety company makes several objections to this jurisdiction.

1. The first and only substantial objection is that no question under the law of the United States was involved in the case. In fact there were several federal questions involved.

It appears upon the face of the original bill of complaint that the complainant claimed through its rights arising from a bond given to the United States government under the Act of August 13, 1894.

While this Act is not referred to specifically, the bond is conditioned precisely as provided for by that act and the court will take judicial notice that the bond was given in accordance with the act.

The action affected a fund then in possession of the United States government and complainant prayed that

the parties be compelled to permit said fund to remain in the possession of the United States government.

The bill alleged that the assignment to certain of the defendants, now appellants, was void under the laws of the United States, and prayed that said assignment be declared to be void.

In the main, all these questions were passed upon by the Circuit Court and were again passed upon by the Circuit Court of Appeals, which in its opinion not only decided the federal questions involved, but specifically referred to the various Statutes in question and based its decision upon those Statutes.

There can be no question that the respondent intended in its bill of complaint to invoke the Statutes of the United States declaring void certain assignments or funds due, or to become due, on public contracts. This question is fairly presented in the bill of complaint, was alluded to by the Circuit Court and more expressly decided by the Circuit Court of Appeals.

Our objections to the conclusions reached it is unnecessary to state here, but there can be no question that from the filing of the bill of complaint down to the decision of the Circuit Court of Appeals, the construction of the Statutes in question was in issue.

The fact that the rights of the complainant, as claimed in its bill of complaint, acrose through a bond re-

quired and given under the Statutes of the United States, is sufficient to sustain the jurisdiction of the Circuit Court on the ground that the cause arose under a Statute of the United States.

Howard vs. United States, 184 U. S. 676;

Sonnentheil vs. Christian Moerlein Brewing Company, 172 U. S. 401;

Feibelman vs. Packard, 109 U. S. 421, 423;

Bachrack vs. Norton, 132 U. S. 337;

Reagan vs. Aiken, 138 U. S. 109;

Bock vs. Perkins, 139 U. S. 628, 630.

In *Howard vs. United States, supra*, it is stated at page 681, "The suit was directly upon a bond taken by the Circuit Court in conformity with the Statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those Statutes". "It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State. * * *

"It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon federal grounds. And as the case was one which could not have been brought here directly from the Circuit Court, the final judgment of the Circuit Court of Appeals could be reviewed in this court upon writ of error sued out by the defendants".

In this case the bond was required not by the judicial but by the executive branch of the government, and from the time of the filing of the bill of complaint down

to the decision of the Circuit Court of Appeals, it was conceded that the case, at least in part, depended upon the scope and effect of that bond and the meaning of the Statute under which it was given.

In addition to the cases of this court already cited on similar bonds, we will cite:

Walker vs. Windsor Nat. Bank (C. C. A. First Circuit) 56 Fed. 76, where it was held that a suit upon the official bond of the cashier of a national bank, given to the association pursuant to Revised Statutes, Section 5136, Clause 5, providing for such bonds, was a suit arising under the laws of the United States.

2. The respondent also objects to the jurisdiction of this court, for the reason that the respondent (being the complainant below), made no sufficiently clear statement of its claim under the Statutes of the United States to comply with the rules of good pleading. It is apparent from the record that the statement of the complainant was sufficiently definite to call forth a ruling by the Circuit Court, and a still more specific and definite ruling from the Circuit Court of Appeals.

The bill of complaint clearly showed that the cause of action arose out of a bond required by the Statutes of the United States, that the complainant claimed its rights through said bond and against a fund in the possession

of the United States, and that it invoked a Statute of the United States for the purpose of having declared void an assignment to appellants herein.

The facts requiring the application of a federal statute being stated, the court will take judicial notice of that statute.

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case' ".

Bridge Proprietors vs. Hoboken Co., 1 Wallace 116, 142.

From the case of:

Warner vs. Searle and Hereth Co., 191 U. S. 195, 205,

we quote as follows:

"In the present case, diverse citizenship, and requisite amount, existed, and the Circuit Court, therefore, had jurisdiction, but it is argued that the jurisdiction

depended entirely on diversity of citizenship, and hence that the decision of the Circuit Court of Appeals was final. We think, however, that as infringement of a trade-mark registered under the act was charged, the averments of the bill, *though quite defective*, were sufficient to invoke the jurisdiction also on the ground that the case arose under a law of the United States, and will not, therefore, dismiss the appeal".

To the same effect see:

Northern Pacific Railway Company vs. Soderberg, 188 U. S. 526, 528.

Furthermore, it will be seen that, as the respondent in this case, both in the Circuit Court and the Circuit Court of Appeals, has relied upon its alleged rights under the laws of the United States, it should now be bound by its contentions there made.

Cooke vs. Avery, 147 U. S. 375, 386.

In *Union Pacific Railway Company vs. Harris*, 158 U. S. 326, 327, an argument very similar to that made in this case seems to have been made, but the objection to the jurisdiction was overruled, and with reference thereto it was stated:

"In the present case jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of plaintiff in error, no federal question arose. It is not for us to enquire why writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad corporations should be allowed simply because the cor-

porations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it."

In *Northern Pacific Railroad Company vs. Amato*, 144 U. S. 466, where the case was removed from the State Court to the Federal Court, no more specific ground of jurisdiction appears to have been stated than that the cause of action arose under an act of Congress by which the corporation was created.

3. It is further objected by the respondent that the appellants have not by their assignment of error sufficiently raised any federal question. The assignments of error, must, of course, be construed with reference to the record presented. In answer to the contention of the respondents, we think it sufficient to state:

(a) It will clearly appear from the assignments of error, considered in connection with the statement in the brief heretofore filed herein that the Statutes of the United States were construed by the Circuit Court of Appeals in its decision of this cause, that the appellants contend that that construction is erroneous and that the construction by them contended for will require a reversal of this case.

(b) If the cause arose under the laws of the United States, we deem it immaterial whether an error is assigned in their construction or not. If this cause were brought up from the Supreme Court of a State, we would be required to show that a right claimed by us under the Constitution or the laws of the United States was decided adversely to our contention. In the present case, under the statute it is only required that we show that jurisdiction was originally taken by the Circuit Court, on the ground, among other grounds, that the cause arose out of a statute of the United States. As illustrating this point, we will simply allude to the case of,

Union Pacific Railway Company vs. Harris, supra, where it clearly appears that this court took jurisdiction of a cause arising out of a law of the United States, though no error in the construction of that law appears to have been presented to the court or decided. The law out of which the cause arose was a statute incorporating the Union Pacific Railway Company. The alleged errors considered related entirely to other matters, such as the negligence of the company and the competence of the plaintiff to execute a release of his cause of action.

Where the Appellate Court has jurisdiction by reason of the cause arising out of a law of the United States, it will decide not only the questions on which the jurisdiction is based but all other questions involved; in other words it will decide the case.

Osborn vs. U. S. Bank, 9 Wheat. 739 (p. 823);
Horner vs. United States, 143 U. S. 570.

4. It is objected by the respondent that it raised a federal question, if at all, only by anticipating a defense of these appellants. The only ground of jurisdiction upon which this point has even a semblance of application is the claim that the assignment to Spencer was void under the laws of the United States. The point has no real application even to this ground of jurisdiction. It was not the claim of the defendants which arose under the statute, but the claim of the complainant that the assignment was void. The assignment itself was admitted, in fact alleged, in the bill, and one of the objects of the action was to secure a decree of the court declaring this assignment void, and the ground on which such a decree was asked was the Federal Statute.

5. We think it unnecesary to comment on the theory that no jurisdiction was shown in the Circuit Court under a law of the United States, because the allegations of the bill showing this jurisdiction were not contained in the jurisdictional clause, but in some other portion of the bill.

Respectfully submitted,

W. W. WILSHIRE,

Solicitor for the Appellants.

GEORGE E. de STEIGUER,

Of Counsel.

IN THE

Supreme Court of the United States

R. M. HENNINGSEN and EDWARD CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER,

Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation); E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

Appellees.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

BRIEF OF APPELLEES

HAROLD PRESTON,
CARROLL B. GRAVES,
EDWARD B. PALMER,
JAMES B. MURPHY,
Solicitors for Appellee.

IN THE

Supreme Court of the United States

R. M. HENNINGSEN and EDWARD CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation), and R. R. SPENCER,

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UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER AND SHINGLE MILL COMPANY (a corporation); E. C. MacDOUGALL and H. T. DINHAM, co-partners as E. C. MacDOUGALL & COMPANY; W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

Appellees.

STATEMENT OF THE CASE.

The statement of the case by the appellants is in the main correct, except that it might be inferred that the testimony fully sustained the allegations of the appellants as set forth in their answer. Their proof does not come up to their allegations—it does not show that any of the money loaned by the appellant bank in question to Hen-

ningsen was used in the fulfillment of the contract in question. In fact, all that the testimony does show is that Henningsen represented to Spencer he needed the money to complete the Fort Lawton contract and to settle a claim on another government contract. The money was passed by the bank to Henningsen's credit and checked out by him when and for what he chose to use it. It does not appear to whom these checks were paid, or that any of them went towards completing the said contract (p. 52).

The record shows that on October 10, 1903, five months after this appellee entered into its contract of suretyship, the appellant bank loaned Henningsen the principal part of the amount in question, taking only a promissory note, and it was not until March 16, 1904, that Henningsen made the assignment of moneys due under the contract to Spencer (p. 53-5).

The amended bill (p. 32) shows that suit had been commenced by this appellee in the Circuit Court to decide the rights of the respective claims of laborers and materialmen against the contractors. This appellee admitted the liability of its contract to the full amount and offered to pay it in court. Surely a court has a right to take judicial notice of its records and judgments.

Appellants seem to lay great stress on the fact that the memorandum decision of the Circuit Court and decree differ in that the former held that the appellee had the right to have the balance due from the government ap-

plied to the debts of the contractors, while the latter ordered the sum held by the bank be paid into court for the sole use and benefit of the appellee. The decision ordered the surety to pay the full penalty of its bond into court, and since nothing is shown to the contrary, we must presume that the officers of the court acted regularly, and in pursuance of the decision the amount was paid into court, and by this act the court held appellee entitled to this fund against appellants and entered the decree accordingly.

There is no creditor represented here, or in any way involved, and the only question to be decided is which one of the contesting parties have a prior equity in this fund.

ARGUMENT.

The appellee claims its superiority and right to subrogation through its contract of suretyship, while the appellants hold that an assignment made by Henningsen ten months after the execution of the contract of suretyship gives them a superior equity. Appellee was ordered by the lower court to pay the penal amount of its bond, and the certificate of that court (Record, p. 69) shows that it paid the full penalty into said court, which satisfied the laborers and materialmen.

I.

What are the rights of the parties?

The assignment made by Henningsen to Spencer is void under the Revised Statutes, §3477 and 3737, as against the rights of third persons.

Greenville Savings Bank et al. vs. Lawrence, 76 Fed. 545.

United States vs. Gillis, 95 U. S. 407.

Spawford vs. Kirk, 97 U. S. 484.

The appellant bank occupies no better position than a general creditor. It was under no obligation to lend this money, and there is no proof that any part of it was used on the contract in question. The money was passed to the credit of Henningsen (p. 52), and checked out to whom and for what no one seems to know, and as far as this fund is concerned the bank is a stranger and a mere volunteer.

Emmert vs. Thompson, 52 N. W. 31.

Sheldon on Subrogation, §240.

Aetna Life Ins. Co. vs. Middleport, 124 U. S. 534.

"The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." There is no paying a debt in the present case, simply a loan. Its equity, if it has any, in the fund in question, dates from the day of the assignments.

The dealings between Henningsen and Spencer were very similar to the dealings of the parties in the *Greenville Savings Bank et al. vs. Lawrence et al.* (76 Fed. 545), and the court, in commenting upon this phase of the case, says:

"It is further urged, that as the money advanced by the bank and Mr. Norwood was loaned to be used, and was used, by Lawrence, in most part, to pay current labor and material claims during the progress of the building, they

should be subrogated to the rights which those persons would have had if they had not been paid.

"The proof shows that the loans were made by the bank to Lawrence upon his promissory notes in the ordinary course of business. The amounts were put to his credit, and he drew the money as he chose. He stated the purpose for which he needed the loans, and he agreed to secure them by securing to the bank as far as he could the payments he expected from the government. The bank did not pay the laborers or material men. Lawrence paid them and extinguished their claims. There was no intention to keep the claim alive for the protection of the bank. The bank relied upon the expectation of getting the government checks and being paid by Lawrence out of them, and not upon any agreement that the labor or material claims should be assigned to it."

The court then quotes from *Sheldon on Subrogation* as follows:

"The doctrine of subrogation is not upheld for the mere stranger of volunteer who has paid the debt of another without any assignment or agreement for subrogation without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own."

The court applying this doctrine held that this manner of dealing gave the bank no equity in the fund as against creditors. In the cast just quoted from, the contract contained a provision reserving a certain amount for the protection of creditors, but it would seem no different in principal when considering the legal effect of such a loan as to this fund whether the right to the fund arises by reason of a contract stipulation or by implication of law, as in the case at bar, so the bank is a stranger to this fund.

II.

On the other hand, this appellee, by admitting its liability and paying the full penalty of its bond into court, comes into court with clean hands. It did equity and to all intents and purposes occupies the same position in a court of equity as a surety who had finished a contract or had already paid the contractors' bills. That is, it is entitled to assert the doctrine of subrogation and has a prior equity in this fund. The doctrine of subrogation does not depend as appellants seem to think, on a lien.

Aetna Life Ins. Co. vs. Middleport, 124 U. S. 534.

Matthews vs. Fidelity Title & Trust Co., 52 Fed. 687.

Memphis & Little Rick R. R. Co. vs. Dow, 120 U. S. 287.

"The right of subrogation is not founded on a contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice and is independent of contractual relations between the parties."

Emmert vs. Thompson, 52 N. W. 31.

"It is a mode which equity adopts to compel the ultimate payment of a debt by one who in justice and good conscience ought to pay."

From the principles set forth in these cases and from the facts in this case there can only be one conclusion. This appellee is entitled to assert the doctrine of subrogation.

Prairie State Bank vs. U. S., 164 U. S. 227.

First National Bank of Seattle vs. City Trust, Safe Deposit Co., 114 Fed. 529.

The only difference in the case at bar and the two cases just cited is that in those cases the sureties finished the contract, while in this case the surety paid the penalty of its bond into court from which the laborers and materialmen were evidently satisfied. There is no difference in the equitable principles involved. In the cases above cited, as in all cases where there is a default involved, the contractors left unpaid bills as well as unfinished work, and if the contention of the appellant be true, then in those cases the surety would have been subrogated to only so much of the money as might be necessary to complete the work and free the government, and that the balance would go to the creditors existing at the time of the default. This distinction has never been made by the courts, but the surety is subrogated to the whole fund regardless of the fact whether the whole thereof was necessary to complete the work, or whether it is necessary to be used in the payment of debts created and unpaid by the defaulting contractor. Subrogation is for the benefit of the surety and not for the benefit of the obligee in the bond, and in the present case the obligation of the surety is dual, and the surety is as much liable for the payment of the indebtedness as it is for the completion of the contract, and the equity of the surety in the fund is created by the contract of suretyship and exists in favor of the surety

against the contractor and his assignees until the surety is released. It is founded upon equitable principles, aside from the set rules of subrogation, and that in condering the priority of equities, the equity of the surety dated back to the execution of the contract of suretyship; that the surety has the benefit of all the securities in the hands of the creditors and that the principal cannot by any action whatsoever defeat or limit that right; also "that a stipulation in the building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that is, that it raises an equity in the surety in the fund to be created * * * " and after reviewing the authorities and cases both in England and in this country, concludes: "Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States and the sureties.."

Prairie State National Bank vs. United States, 164 U. S. 227.

This rule will doubtless govern this appeal, and it is supported by the great weight of authority.

See also *Finney vs. Condon*, 86 Ill. 78.

Appellant concedes the point that if the contractor defaulted as to the construction of the building, the ap-

pellee's position would be secure. By the same reasoning and the same equitable principles, the default being as to the laborers and materialmen, appellee is subrogated to the rights of the creditors in this fund.

Greenville Savings Bank vs. Lawrence, 76 Fed. 545.
Lawrence vs. U. S., 71 Fed. 228.
Reed vs. Pauly, 121 Fed. 652.

In the latter case the court says:

"Where indemnitors of sureties on the bond of a contractor for the erection of a county building were compelled to pay judgments against the contractor, who was subsequently declared a bankrupt, such indemnitors were entitled to an equitable lien on the balance due from the county to the bankrupt, which the trustee subsequently recovered, to the amount of the judgment so paid."—Quotation from syllabus.

This principal should be the rule applied in this case and under it the appellee would have an equitable lien upon this fund, which is superior to that of general creditors, of which the bank must be regarded as one.

Prairie State Bank vs. U. S., 164 U. S. 227.
Finney vs. Condon, 86 Ill. 78.

Richards Brick Company vs. Bothell, 18 *Appeal Cases, D. C.*, 516, is squarely in point. There the contractors made an assignment of a balance due them from the government to apply the principal part of the proceeds to the payment of their general creditors. It was held that sureties, who had signed their bond as required by law, conditioned for the payment of all persons supply-

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ing labor and materials, might maintain an action to prevent the application of the amounts due to the payment of general creditors until all claims, for which recourse might be had to the sureties had been fully paid, and that a receiver would be appointed to prevent such misapplication.

On page 537 the court deals with the relation of the creditors of a government contractor and the relation of sureties of the contractor to the unpaid portion of the contract price while it is in the hands of the government, and holds that the act providing for bonds upon government contracts bears every evidence that it was intended to provide a security for laborers and materialmen on which they could confidently rely for protection, and reasons that because of that fact by necessary implication an equitable lien and preference is secured in favor of the parties furnishing labor and materials in the execution of a contract upon that portion of the contract price remaining unpaid, and the case further holds that the government holds the funds as a *quasi* trustee for the benefit of those entitled to receive it under the conditions of the bond, and the court then says:

"This right to preference being the result of the operation of the statute and the condition of the bond, it is the clear right, upon the plainest principles of justice, of the sureties in the bond to invoke a court of equity to enforce the preference and equitable lien for their protection."

The court sustains this doctrine by reference to the case of *Marble Co. vs. Burgdorf*, 13 Appel. D. C., 506, 519.

The court, in its opinion on the following page (p. 538), holds that a contractor cannot by a subsequent agreement, assignment or power of attorney displace or impair this lien or preference right on the part of the creditors and sureties in favor of general creditors, and on page 543 of the same opinion the court, in discussing the preference right of a person, who by indorsing the contractors' note enabled them to obtain money for use in and which was actually used in the execution of the contract, overrules the lower court and holds that such a person is but a general creditor and bears no particular relation to the fund in question, so that this case holds—

1. That a creditor of a government contractor has an equitable lien and preference in the unpaid part of the contract price.

2. That this preference and lien cannot be displaced or impaired by any act on part of the contractors.

3. That a surety upon a contractor's bond may be subrogated to the rights of the creditor or may institute an action to have the unpaid part of the purchase price applied upon the claim of creditors, and

4. That a person standing in a more favorable position than the appellant bank in this case has no rights in such a fund as against the creditors of the particular contract or the surety upon the contract bond.

It will be observed that in this as in other cases discussed the money advanced was actually used in the performance of the contract, while in the case at bar the

money advanced by the bank was not, so far as the record shows, used in the promotion of the contract.

From the principles laid down in the foregoing cases it is clear that this appellee has the right to assert the doctrine of subrogation; that it has a prior equity in the fund in question; that it is entitled to all the security which would otherwise go to its principal and all of its principal's means and remedies; and that the appellants have no equity in this fund.

III.

The appellants' first contention that appellee is not entitled to assert the right of subrogation is not well founded. They insist that there "must be something in the nature of a lien." Such is not the law. This doctrine is a creation of equity to see that substantial justice is done by one who in good conscience ought to do it.

Aetna Life Ins. Co. vs. Middleport, 124 U. S. 534.

Memphis & Little Rock R. R. Co. vs. Dow, 120 U. S. 287.

Emmert vs. Thompson, 52 N. W. 31.

Prairie State Bank vs. U. S., 164 U. S. 227, and cases cited.

This court has decided, however, in *Prairie State Bank vs. U. S.*, "That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the work

as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created."

Finney vs. Condon, 86 Ill. 78.

None of the cases cited on page 16 of appellants' brief sustains their argument. The appellants argue from those cases that the surety completed the contract, or the contract provided that a certain per cent. should be held until laborers and materialmen had been paid. They argue from the facts and circumstances of those cases and not from the principles upon which they were decided. This appellee contends that this case is within the principles of all of those cases.

The cases of *U. S. vs. Rundell* and *U. S. vs. National Surety Company* distinctly hold that the bond under 28 *Statutes* 278, c. 280, affords full protection to all persons who supplied material or labor in the construction of public buildings and gave them a right of action against the surety. In this case the surety paid the persons whom this act was to protect, and since this court has held in the *Prairie State Bank case* that the surety had an equitable right in the per cent. retained, there can be but one equitable conclusion, and that is that this appellee is entitled to assert the doctrine of subrogation.

The cases cited on page 21 of appellants' brief, with the exception of *Lawrence vs. U. S.*, deal with mechanic's liens, which this appellee admits never existed; that class

of liens deal not with the compensation of the contractor, but with the object or structure upon which the labor was bestowed.

Lawrence vs. U. S. specifically denies any right of the appellant bank to this fund, for the dealings of the bank in that case were the same as in this, and the court says the loaning of the money to the contractor was purely voluntary and the bank had no enforcible rights.

It is a sufficient answer to appellants' second contention, that the right of subrogation does not arise until the laborers and materialmen have been paid, to state that this appellee came into court with clean hands—it admitted its liability; it commenced an action against Henningsen and Clive and their creditors to ascertain who was entitled to the money due from it. This alone amounted to an assumption of Henningsen's debts to the amount of the bond. It paid the penalty of its bond into court. It did equity and occupies in this action the very position that the appellants say that it should.

The memorandum decision of the court below was based upon this principle and required this appellee to pay the full penalty of its bond into court.

Were the appellants to prevail upon this technical point it would avail them nothing. The court would do no more than require a compliance with the memorandum decision of the lower court, requiring it to make a conditional decree, by which the money would be paid to the

appellee upon it paying into court the penal amount of its bond, and this amount having already been paid in and distributed among the creditors, the appellee would be entitled to the same decree that now appears upon record, for certainly the surety would be entitled to have this money kept available until such time as it could by some proceeding protect itself in the payment of its bond obligation.

In the case of *City of Keokuk vs. Love,* reported in 31 Iowa, page 119, on page 124 the court says:

"It is further claimed by the appellee's counsel that the right of subrogation cannot exist until the sureties have paid the obligation of their principal; that such payment was not made when the judgment was entered in this case, and hence they had then no right to be subrogated, and their subsequent payment could give them no claim for a reversal in this court, which must review the case tried, and not decide a new one. All this is answered by the single proposition that the power of a court of equity is not limited to settling rights of parties upon what has been done in the past, but it reaches over and declares their rights for the future, and in the exercise of this latter power it could have decreed that when the sureties paid the debts of their principal they should be subrogated to the rights of the creditor."

We contend that we are within the rule of subrogation as laid down by this court in *Aetna Life Ins. Co. vs. Middleport* and *Prairie State Bank vs. U. S.*

The other cases cited by appellants in support of their contention on this point only attempt to state the general rule as applying to the facts before them, and all the cases cited were cases in which the creditor was en-

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forcing the obligations for which the surety was liable, and the surety was seeking as against the unpaid creditor, subrogation to a portion of his rights or remedies, or cases in which a creditor was enforcing an obligation against a subject matter to which the suretyship related, and the surety was seeking to establish by subrogation a lien upon the same object matter, equal or superior in rank to that of the creditors.

In the case of *James vs. Day*, cited by appellants, Day purchased a farm of James and gave a purchase price mortgage back to James. Day subsequently sold the farm to Close, Close assuming and agreeing to pay the said purchase price mortgage. Close became insolvent. Day paid interest upon the mortgage, his own obligation, and in a foreclosure suit by James, Day sought as against James to establish a lien upon the mortgaged premises for such interest payments equal in rank to Day's mortgage, reasoning that when Close assumed to pay the mortgage his position was chaged to that of surety and the interest payment entitled him to subrogation. This was purely a contest between creditor and the surety on his (surety's) obligation.

The case of *Vert vs. Voss*, also cited by appellants, involved the rights of the surety as against the rights of the creditor, and in this case, as well as in the preceding case, the surety was liable, not for a fixed amount, but for

the whole debt, and is clearly distinguishable from the case at bar.

The case of *Conwell vs. McCowan*, cited by appellants, is very similar to the foregoing cases, and was a case in which the surety, without paying any part of a mortgage indebtedness, sought to foreclose the same as against the person holding the mortgage, and whose indemnitor he was.

In the case of *Columbia Finance and Trust Co. vs. Kentucky Union Railway Co.*, cited by appellants, the surety upon a mortgage note paid interest upon the note, and the question discussed was whether this surety, having paid an installment of interest, would be entitled to subrogation to the rights of the creditors to such an extent that he would have an equal lien with his creditor upon the mortgaged property.

So in none of the cases cited by the appellants to sustain their contention did the surety discharge his whole obligation, nor were any of them contests between a surety and his principal or the successor of the principal.

The third point urged by appellants that appellee has assumed inconsistent positions has no merit. The claimants in the court below had elected to secure relief from the surety. When they saw this fund saved they tried to intervene. This appellee argued by this election they had no equity, and the Circuit Court so decided. The cases cited by appellants in brief on page 29 have no application.

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Appellants' fourth assignment of error in that the certificate from the lower court should not have been considered is unimportant. The certificate simply shows that equity had been done. It did not change the record. It showed that the suit mentioned in the complaint had been terminated and that the complainants had been satisfied, and if the bank has no interest in the payment of those claims it cannot raise this point.

The case of *Hudgins vs. Kemp*, 18 How. 530, cited by appellants, holds that a certificate is inadmissible to impeach the record. This certificate surely did not impeach the record in any way, nor change the equity of the respective parties.

The fifth argument of appellants that the court erred in extending the subrogation beyond the reserved per cent. is not well founded in law.

Rodes vs. Crockett, 24 Am. Dec. 489.

"Sureties who have paid the debt for which they were security may reach in equity any fund set apart by the principal debtor for the payment of such debt, no matter who the trustee or *cestui qui trust* is."

We urge the true rule, as between the surety and his principal and likewise as between the surety and any assignee of his principal, to be that upon paying any part of the principal debt, the surety is entitled to be subrogated to all the securities, funds, liens and equities of the creditor.

Fisher vs. B. & L. Assn., 59 Missouri Appeals 430.

Gedye vs. Matson, 25 Beav. 310.

Motley vs. Harris, 1 Lea. (Tennessee) 577.

Sheldon on Subrogation, Sec. 510.

Mechanics' Savings Bank vs. Scoggin, 52 S. W. 718.

Nettleton vs. Ramsay, 40 Am. St. Rep. 342.

The court in the case of *Fisher vs. B. & L. Assn.*, *supra*, says:

"The case then is this: The Building and Loan Association held a note (already proved up and allowed in the Probate Court) for about $2,400 against the estate of Dr. Fisher. The plaintiff, Mrs. Fisher, was surety on this note, and as such she paid to the association $1,600. She claims, by reason thereof, the right to stand in the shoes of the association and partake of the dividends from the estate in proportion to the amount she had so paid. The general principle is well understood 'that a surety, on paying the debt of his principal, is entitled to be subrogated to all securities, funds, liens and equities which the creditor holds against the principal debtor, or as a means of enforcing payment from him.' *Sheldon on Subrogation*, Sec. 86. The same learned author further says, 'that it is in the nature of a purchase by the surety from the creditor. It operates in equity as an assignment of the debt and the securities to the surety.' Sec. 87.

"But in opposition to the right here, it is earnestly insisted that the plaintiff cannot be subrogated to any of the rights or securities of the Building Association held by it against the Fisher estate, for the reason that she had not paid the entire debt; that the right of subrogation does not exist until the surety shall have paid or satisfied the whole debt.

"The principle here contended for is, in the abstract, correct. As between the creditor and surety, the latter has no right upon a partial payment of the debt to come in and share the securities with the creditor. The creditor has the right to insist upon retaining all rights and means of indemnity until the whole of his claim against

the principal debtor shall have been satisfied. *Ames vs. Huse*, 55 Mo. App. 422. But this is a matter entirely between the surety and the creditor holding the securities; the principal debtor and other creditors can make no such objection to the right of subrogation. As to them, it is immaterial whether the surety has or has not completely satisfied the debt. If the creditor holding the securities shall see proper to admit the surety, who has made a partial payment, to a proportionate share therein, it does no legal or equitable wrong to their interests and they can not be heard to object."

The case of *ex parte Rushford*, 10 Vessey 409, was a case in which the brother of Rushford became his surety in the sum of $10,000 in favor of Seaton & Co., bankers, to indemnify themselves against advances to Rushford. Rushford became insolvent, and it developed that advances made to him by his bankers were greatly in excess of $10,000, and amounted to about $20,000. The surety paid to the bankers, the penal amount of his bond, and in the bankruptcy proceedings, in a contest between himself and the bankers, the surety was pronounced entitled to subrogation, and entitled to a proportionate part with the bankers of the dividends.

The fact that appellee has an equitable right in the fund and that this court has decided that its equity dated from the execution of its bond annuls appellants' sixth contention.

Prairie State Bank vs. U. S., 164 U. S. 227.
Finney vs. Condon, 86 Ill. 78.

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Such being the case, the assignment to Spencer would be void under Revised Statutes 3477 and 3737, so that the cases cited by appellants on page 33 have no application.

The appellants' brief does not state any positive law or authority by which they have any right to the fund in question.

The cases and authorities cited, coupled with the facts in the case at bar, show that this appellee was entitled to assert the doctrine of subrogation; that it had a prior equity in the fund; and that the appellants had no equity.

The decree of the Circuit Court and the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HAROLD PRESTON,
CARROLL B. GRAVES,
EDWARD B. PALMER,
JAMES B. MURPHY,
Solicitors for Appellee.

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No. 361

IN THE

Supreme Court of the United States

B. M. HENNINGSEN and EDWARD W. CLEVE, co-partners, THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and E. R. SPENCER,

Plaintiffs in Error,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY, BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. BINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

Defendants in Error.

APPEAL FROM THE CIRCUIT COURT OF APPEALS NINTH CIRCUIT

Brief of Defendants in Error—On Motion to Dismiss

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IN THE

Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

Plaintiffs in Error,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, and intervenors, SYLVESTER E. BROWN, doing business as S. E. BROWN & COMPANY; BRYANT LUMBER & SHINGLE MILL COMPANY (a corporation), CARSTENS PACKING COMPANY (a corporation), E. C. MacDOUGALL and H. T. BINHAM, co-partners as E. C. MacDOUGALL & COMPANY, W. O. NELSON, E. E. CAINE and the C. B. SMITH COMPANY (a corporation),

Defendants in Error.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

Brief of Defendants in Error--On Motion to Dismiss

HAROLD PRESTON,
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Counsel for Defendants in Error.

IN THE

Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

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Defendants in Error.

Comes now the above entitled defendant, the United States Fidelity & Guaranty Company, and moves the court to dismiss the appeal in the above entitled cause and to enter a judgment of dismissal therein.

This motion is planted upon the ground that the judgment of the Circuit Court of Appeals herein is final and this cause is not reviewable by this court and because this court has no jurisdiction of this cause.

This motion is based upon the record herein and for reasons therefor we respectfully submit:

I.

That the jurisdiction of the Circuit Court, the court in which this action was originally instituted, was dependent entirely upon the opposite parties to the suit being citizens of different states.

II.

Because there is no where in this action involved really and substantially a dispute as to the effect or construction of a federal statute upon the determination of which depends the result of the action.

III.

Because the only discussion of a federal statute was incidentally drawn into question after the institution and determination of this action by the Circuit Court and its relation is immaterial.

IV.

The defendant in error moves the court for a judgment affirming the judgment of the Circuit Court of Appeals for the reason and upon the ground that although the record made shows that this court has jurisdiction, it is manifest that the appeal in this cause was taken for delay only or that the question upon which the jurisdic-

tion of this court depends is so frivolous as not to need further argument.

Dated this 12th day of December, 1906.

Respectfully submitted,

HAROLD PRESTON,
CARROLL B. GRAVES,
E. B. PALMER,
JAMES B. MURPHY,

IN THE

Supreme Court of the United States

R. M. HENNINGSEN and EDWARD W. CLIVE, co-partners; THE NATIONAL BANK OF COMMERCE OF SEATTLE (a corporation) and R. R. SPENCER,

Plaintiffs in Error,

vs.

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Defendants in Error.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
NINTH CIRCUIT

BRIEF ON MOTION TO DISMISS APPEAL

STATEMENT OF THE CASE.

This was an action originally brought by the United States Fidelity & Guaranty Company of Baltimore, Maryland, as complainant against R. M. Henningsen and

W. Clive, co-partners, the National Bank of Commerce, a corporation, and R. R. Spencer, as defendants, in the United States Circuit Court for the District of Washington, Northern Division, for the purpose of restraining the defendants from accepting money due from the United States upon a construction contract and delivering it to the National Bank of Commerce in satisfaction of an indebtedness existing in favor of the bank and against Henningsen and Clive, and bases its right for an injunction upon the fact that it had become surety upon the statutory bond of Henningsen and Clive conditioned that they, as contractors, would perform their contract and pay for material, etc., used in the performance of their contract, and that the said Henningsen and Clive had failed to perform their said contract in that they failed and neglected to pay for material and labor furnished in the performance of the same and the complainant therein was compelled to and did pay, on account of said claims, the full penalty of its bond and was therefore subrogated to the rights of the claimants and entitled to receive the balance due upon its contract as against the bank, who was alleged to be a general creditor.

The defendants in said action resisted the claim of the Guaranty Company upon the ground that they had an assignment of these moneys from Henningsen and Clive and were authorized by a power of attorney executed by the said Henningsen and Clive to collect the unpaid

amount of said contract price and apply the same on account of the bank's indebtedness. The jurisdiction of the Circuit Court was originally invoked upon the ground of diverse citizenship (see original complaint, page 3, and amended and supplemental bill of complaint, page 28). The only reference in the bill of complaint or the supplemental complaint to a federal statute or the construction of a federal statute is found in paragraph VI of the original complaint on page 4 of the record, and in paragraph VI of the amended and supplemental bill of complaint appearing on page 29 of the record. The only words used in either of said paragraphs is that Henningsen and Clive "contrary to the statute of the United States in that behalf provided and contrary to the provisions of said contract made, executed and delivered to the defendant The National Bank of Commerce of Seattle, or to the defendant, R. R. Spencer, as trustee for the benefit of said bank a pretended written assignment of all moneys due, or which might thereafter become due, from the United States to said contractors under and by virtue of the terms of said contract."

Testimony was taken and the cause was submitted to the Circuit Court for its decision and the Circuit Court no where passed upon the validity of the assignment or the construction of a federal statute, but it will appear from the memorandum decision on the merits appearing at page 56 of the record that the court based its decision

entirely upon the relative merits of the equities created by the execution of the bond and the assignments, and holds in effect that a defaulting contractor could not defeat this equitable right created by the signing of the bond by an assignment of the payments to be made by the government.

It is true that when the case came to the Circuit Court of Appeals the surety company endeavored to strengthen its position by attacking the assignment to the bank as contrary to the federal statute and the bank attempted to avoid the application of the statute contended for by the surety company, and the Circuit Court of Appeals passed upon this question presented to it, holding that in view of the federal statute the assignment to the bank was void.

We believe it is apparent, however, from its opinion that the Circuit Court of Appeals did not predicate this decision upon the validity or invalidity of the assignment by Henningsen to Spencer, but upon the fact that the claim of the surety company was prior in time and therefore was a superior equity to that of the bank; the bank being under no obligation to make loans or advance money to Henningsen at the time it did and made them with knowledge that the surety company's claim was prior and superior to its own.

POINTS AND AUTHORITIES.

This action does not arise under the Constitution or

laws of the United States as is contended by the plaintiff's in error.

I.

In all cases in which the jurisdiction is dependent entirely upon diverse citizenship the judgment of the Circuit Court of Appeals is final. Section 6, Judiciary Act of March 3, 1891.

The jurisdiction here referred to is the jurisdiction of the Circuit Court and in determining the grounds upon which the jurisdiction of the Circuit Court was originally invoked, reference must be made to the bill of complaint alone. By reference to the record it will be seen that the jurisdictional clause is contained in paragraph 2 of the original bill of complaint and in the corresponding paragraph of the amended and supplemental bill of complaint. In each of these the jurisdiction of the Circuit Court is invoked upon the sole and only ground of diverse citizenship. In paragraph XI of the supplemental complaint (record page 32) this allegation is made "that by reason of the diverse citizenship of the complainant and each and all of said defendants and by reason of the fact that the amount involved in said suit exceeds the sum of $2,000 this court has full and complete jurisdiction of said suits for all purposes." It seems evident from these references that the jurisdiction of the Circuit Court was originally predicated upon diverse citizenship.

It is true that in paragraph 6 of the original bill of

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complaint (record page 4) and paragraph 6 of the amended and supplemental bill of complaint(record page 29) the complainant alleges upon information and belief that an assignment was made or attempted contrary to the statutes of the United States in that behalf provided. This allegation is not in the jurisdictional clause and the allegation has no reference to the jurisdiction court. If such an allegation were material to the plaintiff's cause of action it could not be held to be the pleading of a federal statute so as to raise its construction or application under the established rules of pleading and in the examination of jurisdiction the court will consider only such facts as are well pleaded. The plaintiff's cause of action was predicated upon the relation of the principal and surety and upon the equitable rule that the principal was about to deprive, by some method, the surety of the securities which were legally his and whether that was to be accomplished on the part of the principal by that of assignment, by gift, fraud or unlawful preference made no difference if there had been no assessment and only an intention and voluntary attempt to pay a general creditor out of the funds the effect would be the same. The effect of the allegation is only that the surety was about to be deprived of its indemnity. The allegation in the complaint to this effect was nothing more than anticipating the defense of the defendant. Such cannot give the court jurisdiction nor can the fact that the defendant in the Circuit Court invokes the protection, benefit or construc-

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tion of the statute aid the plaintiff in error. In the case of *Press Publishing Co. vs. Monroe*, 164 U. S. 105, the court says:

"The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different states, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1,000.00 the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different states.

"The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2,000 showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different states. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Cent. Consol. Min. Co. vs. Turck*, 150 U. S. 138 (37:1030), is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

"The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the Circuit Court of Appeals was final and the writ of error must be dismissed for want of jurisdiction."

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This court, in considering a motion to dismiss in the case of *Florida Central & Pen. R. R. Co. vs. Bell* (176 U. S. 326), says:

"This question must be answered upon the inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of the court because the parties were citizens of different states, or because of the case was alleged to be one arising under the constitution, laws or treaties of the United States?"

And again in the same opinion the court says:

"It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiff's statement of their case.

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear in that class of cases that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance."

* * * * * * * *

The paragraph of the declaration which sets forth the plaintiff's claim is as follows:

"The plaintiffs allege that they claim title to the said land under and by virtue of a patent granted by the government of the United States of America to the said Louis Bell and his heirs, upon a pre-emption claim for said land under the laws of the United States, originally commenced and filed in the local land office of the United States of America at Gainesville, Florida, in 1883, and

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prosecuted by the heirs of Louis Bell and his heirs, the plaintiffs, in said land office; and upon appeal in the General Land Office of the government and upon and from an appeal from the decision of the Commissioner of the said General Land Office to the Secretary of the Interior of the United States, the said heirs prosecuted the pre-emption claim, until by the order and decision of the said Secretary the said patent was granted."

* * * * * * * *

"It is obvious that all that is added by these allegations to the plaintiffs' statement of their own claim is a statement of what the defendant claimed before and at the time of the commencement of this suit in respect to its own title. The plaintiffs were not pretending to have title under the act of May 17, 1856, however it might be construed. That act was, under the allegations of declaration, the source of the defendant's title, but it could not affect the plaintiffs' title unless it were pleaded and set up by the defendant. It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a federal question, cannot create jurisdiction in a Circuit Court by anticipating the defendant's claim, and by alleging that the defendant will set up a defense under some law of the United States."

To the same effect see *American Sugar Refining Company versus New Orleans*, 181 U. S. 277.

Referring to the question of good pleading this court, in the case of *Arbuckle vs. Blackburn*, 191 U. S. 405, says:

"After a jurisdictional clause setting forth diversity of citizenship, the bill averred that by an act of the General Assembly of the State of Ohio, passed in the year 1884, entitled 'An Act to Provide Against the Adulteration of Food and Drugs,' as amended by an act passed in the year 1890, entitled "An Act to Amend Section 3 of an Act Entitled 'An Act to Provide Against the Adultera-

tion of Food and Drugs' Passed March 20, 1884," which act was still in full force and virtue, it was provided that no person should, within the State of Ohio, manufacture for sale, offer for sale, or sell, any article of food which was adulterated within the meaning of said act, and that the term 'food' used therein should include all articles used for food or drink by man, whether simple, mixed or compound."

* * * * * * * *

"In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.

"The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as is required in good pleading. *Defiance Water Co. v. Defiance*, 191 U. S. 184, ante, 140, 24 Sup. Ct. Rep. 63, and cases cited."

II.

If the construction of a statute is involved or if the court concludes that the Circuit Court and the Circuit Court of Appeals accepted the pleadings as arising the construction of a statute and the complainant, the defendant in error, was so benefited by the same that it should not now be heard to urge this point upon appeal to this court, then we urge that there is no assignment of error which sufficiently raises the question to give this court jurisdiction. The only reference to it in the assignment

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of errors is error No. 7, which reads as follows:

"In the absence of any right to the fund on the part of the complainant, the court erred in holding that the respondent bank was not entitled to retain the same both by reason of the consent of the other defendants by their answer, and by virtue of the assignment to Spencer for the use of the bank which was good as between the parties, and only void as against the government of the United States, and those subrogated to its rights."

The alleged error pointed out in the sub-division is that the bank was entitled to retain the money, both by reason of the consent of the other defendants and by virtue of the assignment. In the absence of any rights to the fund by the defendant in error this assignment does not specifically point out any statute relied upon or which is to be construed in connection with said assignment, nor does it assign as an error the wrongful construction of a statute by the Circuit Court of Appeals.

Respectfully submitted,

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